

JOYCE INDUSTRIAL SERVICE

**CONTRACT NOS. V542C-527
V542C-531**

VABCA-6799, 6800

**VA MEDICAL CENTER
COATESVILLE, PA**

Michael Joyce, President, Joyce Industrial Service, Archdale, North Carolina, for the Appellant.

Kenneth B. MacKenzie, Esq., Trial Attorney; *Charlma J. Quarles, Esq.*, Deputy Assistant General Counsel; and *Phillipa L. Anderson, Esq.*, Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE THOMAS

These are timely appeals taken by Appellant Joyce Industrial Service, (Appellant or Joyce) from the contracting officer's final decisions terminating two contracts for default. Contract V542C-527 required telecommunication cable pulling. Contract No. V542C-531 called for repair of the concrete area around the patient swimming pool. Joyce appeals the defaults and seeks an equitable adjustment for costs it incurred dealing with and remedying the problems that arose while performing these contracts. A hearing was held, but representatives of Joyce failed to appear. The evidentiary record before the Board in VABCA No. 6799 consists of Pleadings; Rule 4 file, tabs 1 through 31, cited as (6799 R4, tab _). The evidentiary record before the Board in Contract VABCA No. 6800 includes the Pleadings; Rule 4 file, tabs 1 through 38, cited as (6800 R4, tab _); a hearing transcript for both appeals (tr. 1-23) (cited as "Tr. [page. #]:_."), and a brief from each party.

VABCA 6799: FINDINGS OF FACT

The VA Medical Center, Coatesville, Pennsylvania (VAMC), required the installation of 600 pairs of 24 AWG type ARMM Cable in Building No. 3 for a price of \$23,000. (6799 R/4, tab 8) Joyce received the award to perform this work on May 8, 2001, and the completion date was within 120 days, which was September 5, 2001. (6799 R41, tabs 8, 15)

On May 22, 2001, because Appellant's supplier delivered the wrong cable, Mr. Michael Joyce, President of Appellant, requested and received permission to install 3 cables of 200 pairs instead of the originally required 1 cable of 600 pairs and to use an oil and water resistant cable in lieu of direct buried cable. (6799 R41, tabs 10, 11) Joyce's progress chart showed work to start on May 29 and completion on June 13. The VA paid Joyce \$2,000 for "mobilization" on May 30, 2001. (6799 R41, tab 12)

On July 11, Harry Pearson, the Contracting Officer (CO), sent Joyce a Cure Notice because the required pre-survey had not been performed and thus no work had started. The CO gave Joyce the opportunity to "walk away" from the Contract by stating that if Joyce did not intend to perform, or could not perform, award could be made to the next highest bidder. (6799 R41, tab 13) Joyce maintained that the work would be performed. On August 8, the VA paid Joyce \$10,000 for the cable that had been delivered. (6799 R41, tab 14)

Joyce performed the pre-survey on August 13 and said it intended to pull the cable within 4 weeks. Appellant also asked to work on weekends. (6799 R4, tabs 15, 16) On October 3, the CO issued a Show Cause Order advising Joyce that VA was considering default because Joyce had failed to finish on time, because Joyce had failed to cure the conditions impacting performance; and finally asking Joyce why it should not be terminated for default. (6799 R4, tab 20)

Joyce responded that it was having difficulty hiring people but would complete the Contract by October 31, 2001. (6799 R4, tabs 22, 23)

On October 31, 2001, the CO authored a termination memorandum citing Federal Acquisition Regulation (FAR) 49.402-5 that set forth the reasons for the termination decision as failure to make progress and failure to respond to the Cure Notice. The CO concluded that the termination was in the best interests of the Government. On that same date, the CO, citing FAR 52.249-10, DEFAULT (FIXED PRICE CONSTRUCTION), terminated the contract for default (Default, or T/D). (6799 R4, tab 24) Joyce received the T/D on November 5, 2001. Because the "appeal rights" language was omitted, a new Termination was issued on November 13, 2001. (6799 R4, tab 27)

Subsequent to receipt of the Default, but on the same date, Joyce submitted an invoice to the CO stating only "Invoice #542012141-100501, Requisition/Purchase # 542-01-2-141-0068, Anticipated loss \$55,000." (6799 R4, tab 26) The CO responded by proffering a no-cost settlement agreement, allowing Appellant to keep the \$12,000 already paid. (6799 R4, tab 28) Appellant rejected the CO's offer.

Joyce's Notice of Appeal is factually non-specific and can be summarized as generalized complaints about not getting paid, schedules not being approved and no response in writing from the CO on its change order requests. (6799 R4, tab 29)

Mr. Nicholas Babetski, VA Network Administrator and Contracting Officer's Technical Representative (COTR), and CO Judi Graziano testified that other than the receipt of the wrong cable and pre-survey, no cable pulling related work was ever performed on this project. (Tr. 5, 9) Joyce has presented no evidence that any work was performed for which it is owed payment or any excuse for its failure to complete the Contract.

VABCA No. 6800: FINDINGS OF FACT

On August 6, 2001, Appellant was awarded Contract No. V542C-531, to repair the concrete areas around the outdoor pool for a price of \$14,900. The completion date was November 4, 2001. (6800 R4, tab 6) In two undated "reports" Appellant pointed out a number of problems involving the coping, ceramic tile, handrail sleeve and grounding system that it believed were in need of repair. (R4, tab 7, 8) On August 25, 2001, Joyce submitted a total price of \$14,300 to perform his suggested change orders, with a 20% discount if VA elected to do all of them. (6800 R4, tab 9) VA chose not to have the work performed.

On September 13, 2001, Appellant submitted an invoice for \$3,918.70 plus \$2,000 for mobilization. (6800 R4, tab 12) On September 18, 2001, the CO received an e-mail from Mr. Steven Gray, Mechanical Unit Supervisor and COTR for this project, expressing concern over the slow progress Joyce was making and citing damage to the pool if it was not filled and covered for the winter. (6800 R4, tab 13)

Joyce poured concrete on October 2, 2001. (6800 R4, tab 14) After an inspection on October 3, VA noted four significant problems that had to be corrected before Joyce would be allowed to pour additional concrete. (6800 R4, tab 15) On that same date a Cure Notice was issued setting forth a number of contract deficiencies and stating concern that only one-third of the work had been performed with only 32 days remaining in the Contract. (6800 R4, tab 16)

Joyce responded by undated letter to the VA claiming that the concrete it ordered and received on October 2 was "hot concrete," meaning last in the truck, end of the day, and "not fresh enough to be pouring." Joyce said it had removed all of the defective concrete. (6800 R4, tab 17) On October 9, 2001, Joyce

submitted a letter it characterized as a schedule for finishing the pool work. It said, "I would like to be done with the pool no later then 10-20-01." VA approved Joyce's request to work on Saturday and Sunday, October 13 and 14, 2001. (6800 R4, tab 22) On October 15, 2001, Joyce complained that rain was hindering its work. (6800 R4, tab 23)

The rental company Appellant used came to the site and retrieved its front loader. Long periods of time would go by without Joyce being at the site. On October 31, 2001, the VA terminated the Contract for default for failure to respond to the Cure Notice and failure to make progress. (6800 R4, tab 24) CO Graziano concluded the termination was justified after writing a termination memorandum citing FAR 49.402-5. (6800 R4, tab 25) On that same date, Joyce submitted an invoice for \$14,525 for work performed. (6800 R4, tab 26) On November 6, 2001, VA performed an inspection and determined there were 24 items remaining to be completed. VA determined that Joyce was 35-45% complete. (R4, tab 29) A second termination was issued November 13, 2001 adding the appeal rights. (6800 R4, tab 30)

On December 2, 2001, the CO agreed to pay Joyce \$5,960 representing 40% of the Contract amount. (6800 R4, tab 34) A supplemental agreement reflecting that amount was sent to Joyce on December 12, but Joyce refused to sign it. (6800 R4, 35) Joyce filed a timely Notice Of Appeal.

On April 29, 2002, Joyce demanded that its invoices be paid or it would file suit in Federal Court for \$129,525 plus interest. This Board ordered Joyce to submit copies of those invoices to the Board. Appellant responded by stating that the invoices were in the Rule 4 appeal files as tab 26 for VABCA No. 6799 and tabs 26 and 28 for VABCA No. 6800. Tab 26 in VABCA No. 6799 and tab 28 for VABCA No. 6800 are identical and state, "Anticipated loss.....\$55,000." Tab 26 for VABCA No. 6800 is an invoice for \$14,525, including five unnamed

employees, for what appears to be future wages, although it includes \$315 to get an employee out of jail. Joyce did not submit any additional invoices into the record.

DISCUSSION

The issue here is whether the Contracting Officer's decisions to terminate the subject contracts were proper. It is well settled that a termination for default is a "drastic action ... which should be imposed only for good grounds and on solid evidence." *J. D Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969) It is also well established that the Government "bears the burden of proof on the issue of the correctness of its actions in terminating a contractor for default." *Systems Development Corporation*, VABCA Nos. 1976R, 2354R, 87-3 BCA ¶20,167, citing *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759 (Fed. Cir. 1987)

Appellant failed to perform the contract work within the contractual performance period. The Government has met its burden of proving that the work required under both contracts was incomplete and that the contract performance period had been exceeded. Appellant's inaction on both contracts led the CO to reasonably conclude that the completion dates would not be met by Joyce.

Appellant provided no argument or evidence excusing its failure to perform. We find the termination for defaults were justified. *Nitro Electrical Corp.*, VABCA No. 3377, 95-1 BCA ¶27,492.

There is no credible evidence to support Joyce's demand for payment of its "invoices." Joyce failed to meet its burden of proof. Since the defaults were proper, Appellant is not entitled to payment for unperformed work. *Bill J. Copeland*, AGBCA No. 1999-182-1, 2002 WL 31424028 The CO may retain funds

at the time of termination to be applied to the cost of completing the Contract. *Copeland*, citing *Trinity Universal Insurance Co. v. U.S.*, 382 F.2d 317 (Fed. Cir. 1967), *cert. denied*, 390 U.S. 906, 88S.Ct. 820 (1968).

On these facts and under the terms of the Contract, the VA's decision to terminate the Contracts was reasonable.

DECISION

For the forgoing reasons, the Appeals of Joyce Industrial Service, VABCA Nos. 6799 and 6800, are **DENIED**.

Date: **January 17, 2003**

WILLIAM E. THOMAS, JR.
Administrative Judge
Panel Chairman

We Concur:

GUY H. McMICHAEL III
Chief Administrative Judge

JAMES K. ROBINSON
Vice Chairman